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Blind Justice and Just Arbitrators: Understanding the Federal Arbitration Act's Evident Partiality Standard

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NOTES

BLIND JUSTICE AND JUST ARBITRATORS: UNDERSTANDING THE FEDERAL ARBITRATION ACT'S EVIDENT PARTIALITY STANDARD

Heather Cameron*

Arbitral awards are intended to be binding on parties who subject their disputes to arbitration. However, an arbitrator's bias in favor of one of the parties is one of the few grounds on which a party can object to such an award. The standard used to evaluate such bias is known as "evident partiality."

This Note examines two commonly used standards—referred to in this Note as the "possible impression" standard and the "likely actual bias" standard—deployed by U.S. courts to define evident partiality and determine whether the requirements for vacating an arbitral award have been fulfilled.

This Note advocates that likely actual bias is the correct standard by which courts should determine whether an arbitral award should be vacated for evident partiality ex post—that is, after arbitration. This Note further advocates for a private law solution, which would apply the less demanding possible impression standard to arbitrators' required disclosures ex ante—before arbitration—and impose an affirmative duty on parties to investigate arbitrators' potential biases.

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INTRODUCTION

A large, nationwide bank just lost its case in arbitration and, desperate to overturn the unfavorable award, hires a private investigator to look into the arbitrator's background.¹ The investigator discovers that ten years earlier, the arbitrator opened an account with the bank under her maiden name but closed it after just a year and a half when she got married, changed her last name, and opened a new account with a different bank. Before the arbitration, the arbitrator did not disclose her maiden name or the fact that she briefly had an account with one of the parties many years prior. The bank now moves to have the award vacated, claiming that this undisclosed piece of information indicates that the arbitrator was—or at least may have been—biased against it.

The judge evaluating the bank's motion for vacatur must decide which of two possible standards to use to evaluate the claim. One standard, the "likely actual bias" standard, would allow vacatur only where the facts create a reasonable impression of the arbitrator's likely actual bias toward one of the parties.² The other standard, the "possible impression" standard, would allow vacatur where there is a possible impression of bias.³

1. The hypothetical in this introduction was created for the purposes of this Note to illustrate a problem witnessed in practice. See Lee Korland, *What an Arbitrator Should Investigate and Disclose: Proposing a New Test for Evident Partiality Under the Federal Arbitration Act*, 53 CASE W. RES. L. REV. 815, 816 (2003) ("Displeased parties will often conduct thorough background investigations following the arbitration award for the sole purpose of uncovering . . . an undisclosed conflict that might allow for a successful challenge to the arbitration decision.").

2. See, e.g., *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (holding that "evident partiality" means a reasonable person would have to conclude that an arbitrator actually was partial in favor of one of the parties to arbitration).

3. See, e.g., *Schmitz v. Zilveti*, 20 F.3d 1043, 1046–47 (9th Cir. 1994) (holding that "evident partiality" includes the mere appearance of an arbitrator's bias in favor of one of the

Under the possible impression standard, the judge would likely grant the motion and vacate the award. A reasonable person could, after all, believe the fact that the arbitrator once had an account with one of the parties, and that she failed to disclose that fact, raises the possibility of her bias against that party. It is possible that she had a negative experience transacting with the first bank and failed to disclose her maiden name or the existence of her old account in hopes that the bank would not find out and learn of her negative feelings.

Application of the likely actual bias standard, on the other hand, would likely produce the opposite result. Would a reasonable person think it likely that the arbitrator *actually was* biased against the bank because she briefly had an account with the bank many years prior? Probably not. Large, nationwide banks have millions of account holders, and there are plenty of innocuous reasons someone might switch banks. Would a reasonable person think the arbitrator failed to disclose her maiden name in an attempt to conceal her bias? Again, probably not. It seems more likely that she did not think to list her maiden name because she has not used it in many years and did not think it bore any relevance to the arbitration.

The standard that the judge applies to evaluate this claim of the arbitrator's evident partiality is likely dispositive to the motion's outcome and, therefore, crucial to the final and binding nature of the judgment and award.⁴

When bringing a dispute before a judge, litigants have extremely high expectations as to their adjudicator's impartiality.⁵ Should those expectations be the same when parties contract to resolve their disputes in private arbitration, or is there reason to expect—or at least accept—a different standard for arbitrators? Arbitrators are often selected by the parties precisely because of their expertise in the relevant field.⁶ However, with expertise comes connections, and with connections come the risk that arbitrators may exhibit bias in favor of—or against—the side with whom they have some prior relationship.⁷

parties to arbitration). Courts and commentators use a variety of terms to describe these differing standards. *See infra* notes 89–97 and accompanying text. For the sake of clarity, this Note refers to them as the “likely actual bias” standard and the “possible impression” standard throughout.

4. *See* Korland, *supra* note 1, at 815 (“[P]arties to a disagreement frequently look to arbitration for its finality, since an arbitration award creates fewer grounds for judicial review than does typical litigation.”).

5. *See* *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1137 (9th Cir. 2019) (noting that where there exists potential bias on the part of a judge—despite a lack of actual, subjective bias—the Due Process Clause requires automatic disqualification or recusal), *cert. denied*, 141 S. Ct. 164 (2020) (mem.); *see also* *Wersal v. Sexton*, 674 F.3d 1010, 1024 (8th Cir. 2012) (holding that the mere appearance of impartiality by a judge constitutes a compelling state interest).

6. *See* *Morelite*, 748 F.2d at 83; Korland, *supra* note 1, at 815.

7. *See, e.g.,* *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 245 (3d Cir. 2013) (discussing the arbitrator's extensive experience in the local legal community, her resulting connections to individuals within the relevant industry, and one party's motion to vacate the award, in part, on the basis of the arbitrator's evident partiality in favor of the other party).

To ensure fairness to the parties, it is crucial to determine which types of relationships or connections have the potential to create bias and when that risk is great enough to require disclosure to the parties. Protecting the finality of arbitral awards requires an exacting analysis of such connections. Courts must make this determination when deciding whether to take the drastic action of stepping in to vacate an award intended to be final, binding, and independent of the courts.⁸ To that end, it must be settled whether the party seeking to have the award vacated must show that the arbitrator was, in fact, partial toward the other party, whether the mere possibility of bias is sufficient, or if the appropriate standard lies somewhere in between.

Section 10 of the Federal Arbitration Act⁹ (FAA) grants courts the authority to vacate an arbitral award “where there was evident partiality or corruption in the arbitrators, or either of [the parties].”¹⁰ The meaning of “evident partiality” has been the subject of much litigation over the past fifty years, recently almost reaching the U.S. Supreme Court in the spring of 2020 in *Monster Energy Co. v. City Beverages, LLC*.¹¹ The Court denied certiorari on Monster Energy’s petition—which asked for clarification of the evident partiality standard—and left standing a circuit split on the issue.¹²

A majority of the circuit courts that have addressed the issue have applied a standard requiring that “a reasonable person would *have* to conclude that an arbitrator *was partial* to one party to an arbitration” to justify vacatur of an arbitral award.¹³ A minority of circuits that have addressed the issue, however, have interpreted evident partiality as essentially coextensive with the judicial standard for bias, requiring that arbitrators must not only be unbiased “but must also avoid even the appearance of bias.”¹⁴

8. See Korland, *supra* note 1, at 815 (“[The] benefits [of arbitration] include expedience, the reduced costs that can be realized by avoiding protracted court battles, and the fact that arbitrators often have unique expertise and knowledge about certain industry or business-specific matters that make them preferable to a judge or jury.”).

9. 9 U.S.C. §§ 1–15.

10. *Id.* § 10(a)(2).

11. 940 F.3d 1130 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

12. *Monster Energy*, 141 S. Ct. 164; see also Heather Cameron, *Decided, Granted, Denied: A Look at 2020’s Supreme Court Arbitration Cases*, 38 ALTS. TO HIGH COST LITIG. 118, 131–32 (2020).

13. See Petition for a Writ of Certiorari at 3, *Monster Energy*, 940 F.3d 1130 (No. 19-1333); see, e.g., *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013); *JCI Commc’ns, Inc. v. Int’l Brotherhood of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998); *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984).

14. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968); see Petition for a Writ of Certiorari, *supra* note 13, at 18 (“The minority, led by the Ninth Circuit, find evident partiality anytime an arbitrator does not disclose a fact that could create a ‘reasonable impression’ of bias . . . equat[ing] its ‘reasonable impression of partiality’ standard for vacatur of arbitration awards with the ‘appearance of bias’ standard for judge recusal.”); see, e.g., *Schmitz v. Zilveti*, 20 F.3d 1043, 1146 (9th Cir. 1994); *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982). When determining whether a judge must be disqualified for bias, courts apply an objective test, asking “not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be

Without clarification on which definition of evident partiality is correct, there may be “endless litigation over arbitrations that were intended to finally resolve disputes outside the court system.”¹⁵ Considering that certainty and control are among the qualities parties find most beneficial and appealing about commercial arbitration,¹⁶ a resolution to this question is valuable for the sake of predictability alone. Additionally, to protect arbitral neutrality—both the professional reputations of arbitrators¹⁷ and the general integrity of arbitration as a neutral method of private dispute resolution—while preserving the finality of arbitral awards, the Supreme Court must weigh in and clarify the standard.

When the FAA was enacted, it was not intended to apply outside the commercial arbitration context,¹⁸ but as arbitration in the United States expanded, the Supreme Court took a trans-substantive approach to its FAA jurisprudence.¹⁹ This means that decisions made with one form of arbitration in mind end up applying to all forms of arbitration.²⁰ While the issue of evident partiality has implications for more controversial areas like consumer, employment, and civil rights arbitrations,²¹ this Note focuses exclusively on commercial arbitration.²²

Part I of this Note examines the history of the evident partiality standard, including the FAA’s enactment and the Supreme Court’s only case to address the evident partiality standard, *Commonwealth Coatings Corp. v. Continental Casualty Co.*²³ Part II looks at the way lower courts have interpreted the standard established by *Commonwealth Coatings*, the circuit split that has developed, and the Ninth Circuit’s controversial ruling in

neutral, or whether there is an unconstitutional ‘potential for bias.’” See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

15. *Monster Energy*, 940 F.3d at 1141 (Friedland, J., dissenting).

16. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 73, 86 (2d ed. 2014).

17. See, e.g., *OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, 975 F.3d 449, 452–53 (5th Cir. 2020) (“[The arbitrator] argued that intervention [into the district court’s decision] was necessary to protect ‘his reputation for veracity and integrity, which has been harmed by the Opinion’s statements that he is a liar and corrupt.’” (quoting Motion to Intervene by Defendant Patrick Long, *OOGC Am., L.L.C. v. Chesapeake Expl., L.L.C.*, No. 17-248, 2018 WL 6333830 (S.D. Tex. Dec. 5, 2018), *vacated*, *OOGC Am.*, 975 F.3d 449)).

18. See Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1134 (2019) (“According to scholars, the [FAA] ‘was originally designed to cover contractual disputes between merchants of relatively co-equal bargaining power.’” (quoting Imre S. Szalai, *Reconciling Fault Lines in Arbitration and Redefining Arbitration Through the Broader Lens of Procedure*, 18 NEV. L.J. 511, 524–25 (2018))); Jay E. Grenig, *Evolution of the Role of Alternative Dispute Resolution in Resolving Employment Disputes*, 71 DISP. RESOL. J. 99, 108–10 (2016).

19. See Bookman, *supra* note 18, at 1171–72.

20. See *id.* at 1187 (“This trans-substantivity also deserves criticism for making arbitration decisions in other contexts apply to international commercial arbitration, often to the detriment of private law and international business values that are particularly important in international commercial arbitration.”).

21. See Cameron, *supra* note 12, at 131.

22. Defining and applying evident partiality in the commercial arbitration context is complicated in its own right, therefore, discussion of evident partiality as it applies to other types of arbitration is beyond the scope of this Note.

23. 393 U.S. 145 (1968).

Monster Energy. Part III argues for uniform adoption of the likely actual bias standard when courts review arbitral decisions and advocates for the Supreme Court to grant certiorari on the issue and clarify the standard. Part III also discusses the need for explicit, uniform disclosure guidelines for arbitrators and argues for a private law solution. This part advocates for both arbitral providers and individual arbitrators to apply the possible impression standard when evaluating required disclosures and to impose an affirmative duty on parties to investigate arbitrators' disclosures.

I. THE ORIGINS OF EVIDENT PARTIALITY

Arbitration has a reputation for speed and inexpensiveness relative to traditional litigation,²⁴ promises relief for overloaded court dockets,²⁵ and gives parties the ability to designate trade-specific arbiters.²⁶ Despite these features, courts were traditionally hostile toward arbitration, deeming it an inferior process that could not give parties the same quality of justice available to them in courts.²⁷ Over the course of the twentieth century, the judiciary's attitude toward arbitration shifted, and today, the Supreme Court is decidedly pro-arbitration.²⁸ Arbitral awards can only be challenged on very narrow grounds,²⁹ and one of the most common of those narrow grounds—evident partiality³⁰—has been addressed by the Supreme Court only once.³¹

Part I.A of this section discusses the history of the legal provision under which parties can challenge an arbitral award for evident partiality. Part I.B

24. See Elizabeth A. Murphy, Note, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, *Lifecare International, Inc. v. CD Medical, Inc.*, 1996 J. DISP. RESOL. 463, 466. But see Bookman, *supra* note 18, at 1165 (“[Arbitration] is expensive. It can be far from speedy.”).

25. See Murphy, *supra* note 24, at 466.

26. See Ronán Feehily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice*, 7 PENN ST. J.L. & INT'L AFFS., no. 1, 2019, at 88, 102 (“[E]xperts in particular industries, disciplines and legal communities have contacts and relationships with the parties and their counsel, and . . . disqualifying experienced individuals based on such factors is not required to preserve impartiality and would deprive the parties of competent experienced specialists to decide on their disputes.”).

27. See Murphy, *supra* note 24, at 466.

28. See Bookman, *supra* note 18, at 1120–21; see also Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2036 (2011).

29. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (noting that § 10 of the FAA only authorizes vacatur for “egregious departures from the parties’ agreed-upon arbitration”); *Moncharsh v. Heily & Blase*, 832 P.2d 899, 904 (Cal. 1992) (“[A]rbitration awards are generally immune from judicial review.” (quoting *Nogueiro v. Kaiser Found. Hosps.*, 250 Cal. Rptr. 478, 479 (Ct. App. 1988))); *Korland*, *supra* note 1, at 815 (noting that there are fewer grounds for judicial review in arbitration than in typical litigation).

30. See Kathryn A. Windsor, Comment, *Defining Arbitrator Evident Partiality: The Catch-22 of Commercial Litigation Disputes*, 6 SETON HALL CIR. REV. 191, 192 (2009); see also *Korland*, *supra* note 1, at 815 (“One common means of challenging an arbitration award is for the losing party to claim that a supposedly neutral arbitrator was partial to the other party in the dispute.”).

31. See generally *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968); see also *Petition for a Writ of Certiorari*, *supra* note 13, at 3–4.

discusses the Court's fragmented opinion in its first and only case addressing the standard: *Commonwealth Coatings*.

A. The FAA's Evident Partiality Standard

Congress enacted the FAA³² in 1925 in response to judicial hostility toward arbitration agreements.³³ The FAA was intended to set arbitration agreements on an equal footing with other types of contracts.³⁴ Section 10 of the FAA lays out the conditions on which an arbitration award can be vacated.³⁵ In addition to evident partiality, grounds for vacatur include corruption, fraud, undue means, misconduct, misbehavior, or an overreach of power by the arbitrator(s).³⁶

Though the grounds for challenging an award are intentionally limited,³⁷ their availability under appropriate circumstances is vital to maintaining parties' confidence in the arbitration process's fairness.³⁸ Arbitration has become an increasingly widespread method of dispute resolution,³⁹ so maintaining confidence in the institution is crucial.⁴⁰

B. Commonwealth Coatings

Since the FAA's 1925 enactment, the Supreme Court has examined the evident partiality standard only one time.⁴¹ Fifty-three years ago, in *Commonwealth Coatings*, a majority of the Justices agreed to overturn the

32. Pub. L. No. 68-401, 43 Stat. 833 (1925) (codified as amended in scattered sections of 9 U.S.C.).

33. See Cynthia A. Murray, Note, *Contractual Expansion of the Scope of Judicial Review of Arbitration Awards Under the Federal Arbitration Act*, 76 ST. JOHN'S L. REV. 633, 635 (2002).

34. See *id.* at 635.

35. *Commonwealth Coatings*, 393 U.S. at 147.

36. 9 U.S.C. § 10(a) provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

37. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (“[L]imited review [is] needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”).

38. See Murphy, *supra* note 24, at 475.

39. See Korland, *supra* note 1, at 817–18; Braydon Roberts, Note, *An Evident Contradiction: How Some Evident Partiality Standards Do Not Facilitate Impartial Arbitration*, 43 J. CORP. L. 681, 697 (2018).

40. See Murphy, *supra* note 24, at 476 (“Unhappy with unjust results, the public may refuse to arbitrate agreements and cause all the efficiency benefits of the process to be lost.”).

41. See generally *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968).

award in question on the grounds of evident partiality by one of the three arbitrators, but no clear rationale emerged.⁴²

The case involved a dispute over a painting job in Puerto Rico between the prime contractor, respondent Continental Casualty, and the subcontractor, petitioner Commonwealth Coatings.⁴³ The contract for the painting job included an arbitration agreement, and each party selected an arbitrator who, together, selected a third neutral arbitrator.⁴⁴ The third arbitrator had done sporadic but repeated and significant business with the prime contractor, including rendering services on the projects at issue in the immediate dispute.⁴⁵ This fact was not disclosed to the subcontractor by the arbitrator or the prime contractor until after an award was issued.⁴⁶ The subcontractor challenged the arbitration award on, among other grounds, evident partiality, but the U.S. District Court for the District of Puerto Rico declined to vacate the award, and the First Circuit affirmed before the Supreme Court granted certiorari.⁴⁷

1. Justice Black's Opinion

The opinion of the Court,⁴⁸ written by Justice Hugo Black, interpreted evident partiality as coextensive with the judicial bias standard, requiring that arbitrators must not only be unbiased “but also must avoid even the appearance of bias.”⁴⁹ Justice Black acknowledged that there was nothing in the facts of the case to suggest improper motives on the part of the third arbitrator other than his undisclosed business relationship with the prime contractor.⁵⁰ However, he noted that if a similar undisclosed relationship was discovered between a litigant and a judge or the foreman of a jury, the

42. See generally *id.*; see also *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984); Feehily, *supra* note 26, at 101.

43. *Commonwealth Coatings*, 393 U.S. at 146.

44. See *id.* Arbitration agreements typically provide for either one or three arbitrators and designate the mechanism for their appointment. See BORN, *supra* note 16, at 207. The arbitration agreement in *Commonwealth Coatings* designated a three-arbitrator tribunal, requiring each party to select one arbitrator and for those two party-appointed arbitrators to appoint a third. See *Commonwealth Coatings*, 393 U.S. at 146.

45. See *Commonwealth Coatings*, 393 U.S. at 146.

46. See *id.*

47. See *id.*

48. This Note refers to Justice Hugo Black's opinion simply as the “opinion of the Court,” rather than the “majority opinion” or the “plurality opinion,” to acknowledge the debate among the circuits over its classification. See *infra* note 85. A plurality opinion is one “lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion.” *Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019). Plurality opinions arise in the U.S. Supreme Court when a majority of Justices agree on a case's outcome but not on the reasons for that outcome, and they sometimes present lower courts with complicated and unclear direction as to what constitutes the resulting binding precedent. See Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 795 (2017). Determining whether Justice Black's opinion constitutes a majority or a plurality opinion, while related, is ultimately secondary to the substantive question of how to interpret and apply the evident partiality standard and is, therefore, beyond the scope of this Note.

49. *Commonwealth Coatings*, 393 U.S. at 150.

50. See *id.* at 147.

judgment in that case would be subject to challenge.⁵¹ In his opinion, Justice Black wrote that the arbitrator's failure to disclose his relationship with the prime contractor constituted a "manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in [the] case."⁵² Because the judicial impartiality requirement is a constitutional principle, Justice Black saw no reason to interpret § 10's statutory language as imposing a different standard when applied to arbitration proceedings.⁵³

Despite acknowledging that it would be unrealistic to expect arbitrators to sever all ties with the business world, Justice Black wrote that their connections actually call for even more scrupulous safeguarding of their impartiality than is needed with judges because arbitrators have free rein to decide questions of law and fact without the safeguard of appellate review.⁵⁴ He did not expect that requiring arbitrators to disclose to parties "any dealings that might create an impression of possible bias" would impair arbitration's effectiveness as a process.⁵⁵ In fact, though conceding they were not controlling in the immediate case, Justice Black pointed out that the American Arbitration Association's (AAA) then effective rules asked prospective arbitrators to disclose circumstances that might create a presumption of bias or disqualify them as being impartial.⁵⁶

Justice Black concluded that any judicial or arbitral tribunal permitted to try cases and controversies must be unbiased in fact and must also "avoid even the appearance of bias."⁵⁷ He found it impossible to imagine Congress intended to allow parties to submit their claims to arbitrators who might reasonably be perceived as biased in favor of or against one of the parties.⁵⁸

2. Justice White's Concurrence

Two of the five Justices joining Justice Black's opinion also joined a narrowing concurrence authored by Justice Byron White.⁵⁹ Justice White clarified that the Court's opinion should not be understood to mean that arbitrators should be held to the same standards of judicial decorum as Article III or, for that matter, any judges.⁶⁰ He emphasized that it is often because,

51. *See id.* at 148.

52. *Id.*

53. *See id.*

54. *See id.* at 148–49.

55. *Id.* at 149.

56. *See id.*

57. *Id.* at 150.

58. *See id.*

59. *See id.* at 150–52 (White, J., concurring); *see also* *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 n.3 (2d Cir. 1984) ("It might be thought that Justice Black's opinion represents the views of six members of the Court, for Justice White wrote that he was 'glad to join my Brother Black's opinion.' Because the two opinions are impossible to reconcile, however, we must narrow the holding to that subscribed to by both Justices White and Black." (quoting *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring))).

60. *See Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring).

not in spite, of arbitrators' connections to their industries that they are effective adjudicators.⁶¹ Therefore, Justice White wrote, arbitrators should not automatically be disqualified because of a business relationship with one of the parties, as long as either (1) both parties are informed of the relationship in advance of the arbitration or (2) the relationship is too trivial to require disclosure.⁶²

He went on to emphasize the importance of limiting courts' involvement in evaluating an arbitrator's neutrality since the parties themselves are in a better position to do so.⁶³ The parties "are the architects of their own arbitration process" and are better informed about arbitrators' reputations and the accepted ethical standards within their own line of business.⁶⁴

Justice White's solution was to require arbitrators to disclose any past or present financial transactions with either party to both parties at the outset of the process.⁶⁵ That way both parties would be able to make an informed decision about the arbitrator's ability to act as an impartial adjudicator to their dispute, and the arbitrator would not need to worry that the very act of voluntarily revealing an insubstantial business relationship might suggest partisanship.⁶⁶ By legally requiring such disclosure up front, arbitrators and parties would wholly avoid a relationship coming to light after arbitration and "a suspicious or disgruntled party . . . seiz[ing] on it as a pretext for invalidating the award."⁶⁷

Justice White noted that arbitrators might have remote business relationships with a large number of people, so it would be unrealistic to expect them to divulge every commercial connection to the parties.⁶⁸ For the present case, Justice White wrote it was sufficient to hold that, since the arbitrator had a substantial interest in a firm that had done more than trivial business with one of the parties, he was required to disclose that fact.⁶⁹ Justice White optimistically suggested that if arbitrators err on the side of disclosure, it should not be hard for courts to determine which undisclosed relationships are too insignificant to warrant vacatur under § 10(a)(2).⁷⁰

Unlike Justice Black's opinion for the Court,⁷¹ the concurrence claimed to hold that the bias disqualification standard for federal judges does not establish evident partiality on the part of an arbitrator.⁷²

61. *See id.*

62. *See id.*

63. *See id.* at 151.

64. *Id.*

65. *See id.*

66. *See id.* ("In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party.")

67. *Id.*; *see infra* Part III.C.

68. *See Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring).

69. *See id.* at 151–52.

70. *See id.* at 152.

71. *See id.* at 150 (opinion of the Court).

72. *See id.* (White, J., concurring).

3. Justice Fortas's Dissent

In a dissent joined by two others, Justice Abe Fortas wrote that he would affirm the lower courts' decisions finding no evident partiality and uphold the arbitration award.⁷³ He found that where there existed no claim of actual partiality, unfairness, or misconduct, § 10(a) could not support a finding of evident partiality.⁷⁴

The dissent's position is helpful in clarifying the common thread between Justice Black's opinion for the Court and Justice White's concurrence.⁷⁵ Neither the opinion of the Court nor the concurrence held that evidence of actual bias or partiality on the part of an arbitrator is required to vacate an award for evident partiality.⁷⁶ The dissent would have interpreted the term to require such evidence.⁷⁷ It is, therefore, clear from *Commonwealth Coatings* that evident partiality does not mean actual partiality.⁷⁸ Left uncertain in the wake of *Commonwealth Coatings* was whether the mere appearance of possible bias is sufficient to warrant vacatur for evident partiality, as Justice Black wrote,⁷⁹ or if something more must be shown, as Justice White indicated.⁸⁰ If something more is required to warrant vacatur for evident partiality, *Commonwealth Coatings* also left unclear what that additional showing entails.⁸¹

II. A BLACK AND WHITE CIRCUIT SPLIT?

Following the Court's *Commonwealth Coatings* decision, the combination of uncertainty about the reasonable impression of bias standard⁸² and a lack of clarity on what constitutes what Justice White called an arbitrator's "substantial interest" in a firm that had done more than trivial business with one of the parties,⁸³ has resulted in a "fact-sensitive, case-by-case inquiry into each dispute with little predictability as to future outcomes."⁸⁴ Courts

73. *See id.* at 152 (Fortas, J., dissenting).

74. *See id.* at 155.

75. *Compare id.* at 152 (finding that "[t]he facts in this case do not lend themselves to the Court's ruling" since there was "no claim . . . of actual partiality, unfairness, bias, or fraud"), *with id.* at 147 (opinion of the Court) (holding that there was evident partiality despite the petitioner's failure to allege "that the third arbitrator was actually guilty of fraud or bias"), *and id.* at 151–52 (White, J., concurring) (agreeing with the Court's holding).

76. *See id.* at 147 (opinion of the Court) ("It is true that petitioner does not charge before us that the third arbitrator was actually guilty of fraud or bias in deciding this case, and we have no reason, apart from the undisclosed business relationship, to suspect him of any improper motives."); *id.* at 151–52 (White, J., concurring) (holding that failure to disclose a nontrivial business relationship with one of the parties is sufficient to find evident partiality). By negative implication, Justice White's concurrence finds that proof of actual bias is not necessary to find evident partiality. *Id.*

77. *See id.* at 152 (Fortas, J., dissenting).

78. *See id.* at 147 (opinion of the Court).

79. *See id.* at 150.

80. *See id.* at 151–52 (White, J., concurring).

81. *See* Murphy, *supra* note 24, at 470.

82. *See supra* Part I.B.

83. *See supra* Part I.B.2.

84. Windsor, *supra* note 30, at 198.

disagree on whether Justice Black's or Justice White's opinion was controlling and which portions of each constitute dicta.⁸⁵

Part II.A discusses the circuit split that has developed over how to interpret *Commonwealth Coatings* and the majority and minority standards adopted by the courts. Part II.B discusses *Monster Energy*, a relatively recent Ninth Circuit case addressing evident partiality, which highlights the significant differences between the standards.⁸⁶

A. Interpretations of the Evident Partiality Standard in the Wake of *Commonwealth Coatings*

Since *Commonwealth Coatings*, the First, Second, Third, Fourth, Fifth, and Sixth Circuits—a majority of those that have addressed the issue—have required parties seeking vacatur of an arbitral award for evident partiality to show that “a reasonable person would *have to* conclude that an arbitrator *was partial* to one party to the arbitration.”⁸⁷ The Ninth and Eleventh Circuits—a minority of the circuits to address the issue—have adopted a less demanding standard that authorizes vacatur for the “reasonable impression of partiality.”⁸⁸

Different sources describe these standards in a number of ways under a dizzying variety of names.⁸⁹ The majority standard has been characterized

85. Compare *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82–83 (2d Cir. 1984) (concluding that Justice Black's opinion constituted a plurality, so Justice White's concurrence narrowed the holding), with *Schmitz v. Zilveti*, 20 F.3d 1043, 1046–47 (9th Cir. 1994) (finding that despite the apparent contradiction between Justice Black's opinion and Justice White's concurrence, Black's opinion, including its “appearance of bias” language, constituted a majority because it received at least five votes).

86. See *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

87. See Petition for a Writ of Certiorari, *supra* note 13, at 19 (quoting *Morelite*, 748 F.2d at 84); see, e.g., *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013); *JCI Commc'ns, Inc. v. Int'l Brotherhood of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998); *Morelite*, 748 F.2d at 83–84.

88. See Petition for a Writ of Certiorari, *supra* note 13, at 22; see, e.g., *Schmitz*, 20 F.3d at 1046; *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982).

89. See, e.g., *Freeman*, 709 F.3d at 253 (“An arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side.”); *JCI Commc'ns*, 324 F.3d at 51 (“Evident partiality is more than just the appearance of possible bias.”); *Schmitz*, 20 F.3d at 1047 (“‘Reasonable impression of partiality’ . . . is the best expression of the *Commonwealth Coatings* court's holding.”); *Morelite*, 748 F.2d at 84 (“[W]e hold that ‘evident partiality’ within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”); *Windsor*, *supra* note 30, at 192 n.10 (“The three interpretations [of evident partiality] are: (1) that arbitrators are expected to be ‘completely impartial,’ with absolutely ‘no connection with the parties or the dispute involved which might give the appearance of partiality’ unless otherwise agreed to by the parties; (2) that ‘an appearance of bias’ will only disqualify an arbitrator where an arbitrator exhibits some sort of personal interest, e.g., a pecuniary interest; and (3) that a ‘reasonable impression of partiality’ establishes when an arbitrator possesses a duty to disclose.” (citations omitted) (quoting 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2008))); *id.* (observing “that arbitrator evident partiality consists of a ‘middle ground’

as requiring sufficiently obvious bias that a reasonable person would easily recognize⁹⁰ or bias such that a reasonable person would necessarily conclude that there was partiality.⁹¹ This is what this Note refers to as the “likely actual bias” standard. The minority standard has been called “appearance of bias,”⁹² “mere ‘appearance of bias,’”⁹³ an “impression of possible bias,”⁹⁴ the “appearance of partiality,”⁹⁵ a “reasonable impression of partiality,”⁹⁶ and the “specter of partiality.”⁹⁷ This Note refers to this as the “possible impression” standard.

Both the majority and minority standard—whether explicitly or implicitly—use the “reasonable person” concept, which asks what a hypothetical rational, typical person would think or do.⁹⁸ The majority and minority approaches both require courts to determine whether a reasonable person would perceive bias.⁹⁹ The salient difference between the standards is how likely that bias must be: whether a reasonable person must believe the arbitrator actually was biased or if the mere possibility of the arbitrator’s bias is sufficient.

1. The Possible Impression Standard

Both the Ninth and Eleventh Circuits have adopted the minority’s possible impression standard.¹⁰⁰ This standard presents the party challenging an

between the ‘appearance of bias’ standard and the ‘actual bias’ standard” (quoting 4 AM. JUR. 2D *Alternative Dispute Resolution* § 138 (2008))).

90. See *Freeman*, 709 F.3d at 251–53.

91. See *JCI Commc’ns*, 324 F.3d at 51.

92. *Morelite*, 748 F.2d at 83; Windsor, *supra* note 30, at 192 n.10.

93. *Morelite*, 748 F.2d at 83–84.

94. *Schmitz*, 20 F.3d at 1045 (quoting *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 149 (1968)).

95. Windsor, *supra* note 30, at 192 & n.10.

96. *Sheet Metal Workers Int’l Ass’n, Local No. 162 v. Jason Mfg., Inc.*, 900 F.2d 1392, 1398 (9th Cir. 1990) (quoting *Sheet Metal Workers Int’l Ass’n Local Union No. 420 v. Kinney Air Conditioning Co.*, 756 F.2d 742, 745 (9th Cir. 1985)); Windsor, *supra* note 30, at 192 n.10.

97. *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1135 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

98. See OLIVER WENDALL HOLMES JR., *THE COMMON LAW* 108 (Sheldon M. Novick ed., Dover Publ’ns, Inc. 1991) (1881) (“The law considers . . . what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that.”); see also James M. Kramon, *Law and Literature Series: Truth in Fiction and Law*, MD. BAR J., Mar./Apr. 2010, at 46, 48–49.

99. See *Monster Energy*, 940 F.3d at 1137 (noting that several states within the Ninth Circuit have adopted the Revised Uniform Arbitration Act, which requires arbitrators to disclose all known facts that a reasonable person would think likely to affect the arbitrator’s ability to be impartial and establishes a presumption of evident partiality for failure to do so); *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984) (“[W]e hold that ‘evident partiality’ within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”); Windsor, *supra* note 30, at 212 (noting that courts use an objective “reasonable person” standard in their arbitrator impartiality calculus).

100. See *Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994) (“Other courts facing the same issue have held that ‘evident partiality’ is present when undisclosed facts show ‘a reasonable impression of partiality.’ Our examination . . . persuades us . . . that this

award with a lower hurdle than the majority standard—likely actual bias—because “circumstances can convey an *impression* of partiality without necessarily dictating a *conclusion* of partiality.”¹⁰¹

In *Schmitz v. Zilveti*,¹⁰² the Ninth Circuit reasoned that since Justice White joined in Justice Black’s “majority opinion” and only wrote separately to make “additional remarks,” Justice Black’s opinion constituted a controlling majority rather than a mere plurality.¹⁰³ The court found that despite stating that the partiality standard for arbitrators is not the same as the standard applicable to judges, Justice White did not explicitly reject Justice Black’s “appearance of bias” language, meaning that the “appearance of bias” standard received a majority of the Court’s votes.¹⁰⁴

The Ninth Circuit held that the concurrence simply pointed out that, because arbitrators are often experts within their respective fields, they have many more potential conflicts of interest than judges.¹⁰⁵ Unlike judges, arbitrators are required only to disclose those potential conflicts; they are not required to recuse themselves.¹⁰⁶

Thus, in *Schmitz*, the Ninth Circuit found that the easier-to-meet “impression of possible bias,” the possible impression standard, best supports the policies of § 10 of the FAA, which aims to encourage disclosure and indicates that the standard for nondisclosure cases should be different than the standard for actual bias cases.¹⁰⁷ Parties can only select their arbitrators intelligently when arbitrators disclose all facts that might give rise to their possible partiality, and “[w]hether the arbitrators’ decision itself is faulty is not necessarily relevant.”¹⁰⁸

Similarly, the Eleventh Circuit interpreted the rule from *Commonwealth Coatings* as “somewhat analogous to a per se rule” or an irrebuttable presumption that requires setting aside an award once it is established that the arbitrator actually knew of, but failed to disclose, potentially prejudicial facts that could have impaired the arbitrator’s judgment.¹⁰⁹ The Eleventh Circuit clearly outlined what the court recognizes as the two circumstances under which vacatur for evident partiality is appropriate: when (1) there is an actual conflict or (2) “the arbitrator knows of, but fails to disclose,

formulation is the most succinct expression of the *Commonwealth Coatings* standard.” (quoting *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982)).

101. See *Burlington N.R.R. Co. v. TUCO Inc.*, 960 S.W.2d 629, 634 (Tex. 1997).

102. 20 F.3d 1043 (9th Cir. 1994).

103. See *id.* at 1045 (quoting *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150, 151 n.* (1968) (White, J., concurring)).

104. See *id.* at 1046.

105. See *id.*

106. See *id.* at 1047.

107. See *id.*

108. *Id.*

109. See *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982) (quoting *Overseas Priv. Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107, 110 (D.D.C. 1976)).

information which would lead a reasonable person to believe that a potential conflict exists.”¹¹⁰

2. The Likely Actual Bias Standard

The majority of circuits, on the other hand, have set a higher bar for parties seeking vacatur under § 10(a)(2).¹¹¹ In stark contrast with the Ninth Circuit, the Second Circuit held that Justice Black’s opinion was a plurality, receiving votes from only four of the nine Justices, and thus was not controlling.¹¹² Justice White, the Second Circuit wrote, concurred in the judgment but explicitly rejected the holding in Justice Black’s opinion that the ethical standards for arbitrators and judges are coextensive.¹¹³ Finding that much of Justice Black’s opinion was therefore dicta,¹¹⁴ the Second Circuit attempted to make sense of the appropriate standard by examining its own prior decisions.¹¹⁵

Weighing arbitration’s competing interests of employing expert arbitrators and maintaining impartiality, the court read § 10 to require “a showing of something more than the mere ‘appearance of bias’ to vacate an arbitration award” because allowing vacatur under such a low standard would render arbitration ineffective in a number of commercial settings.¹¹⁶ The court found that requiring proof of actual bias was an equally unappealing standard, noting that such an “insurmountable” and “often impossible [standard] to ‘prove’” would diminish the public’s confidence in arbitration’s fairness.¹¹⁷

With appearance of bias too low a standard and proof of actual bias too high, the Second Circuit settled in the middle, holding that evident partiality means “a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”¹¹⁸ The court’s holding clarified that the standard it adopted falls between possible and actual bias.¹¹⁹ Therefore, as it is used in this Note, likely actual bias means that there is persuasive

110. *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002) (quoting *Gianelli Money Purchase Plan & Tr. v. ADM Inv. Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998)).

111. *See supra* note 87 and accompanying text.

112. *See Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2d Cir. 1984).

113. *See id.* at 82–83.

114. *See id.* at 83 n.3 (“Because the two opinions are impossible to reconcile, however, we must narrow the holding to that subscribed to by both Justices White and Black.”).

115. *See id.* at 83 (citing *Int’l Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981)).

116. *Id.* at 83–84.

117. *Id.* at 84 (“Such a standard, we fear, occasionally would require that we enforce awards in situations that are clearly repugnant to our sense of fairness, yet do not yield ‘proof’ of anything.”).

118. *Id.*

119. *See id.* at 85 (“We do not intend to hold arbitrators to all the standards of Canon 3. Neither do we intend that unsuccessful parties to arbitration may have awards set aside by seeking out and finding tenuous relationships between the arbitrator and the successful party. We hold only that the uncontested relationship here at issue is such that reasonable people would have to believe it provides strong evidence of partiality by the arbitrator.”).

evidence of partiality, rather than mere speculation or possibility, but it does not require proof that the arbitrator actually was biased.

The Third Circuit, following the Second Circuit, also argued that a plain reading of the text¹²⁰ of § 10(a)(2) supports the application of the likely actual bias standard.¹²¹ “The word ‘evident’ suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator’s bias must be sufficiently obvious that a reasonable person would easily recognize it.”¹²²

In addition to the Third Circuit, the First, Fourth, Fifth, and Sixth Circuits have all also adopted the Second Circuit’s more demanding likely actual bias evident partiality standard.¹²³ In addition to adopting the majority standard, the Third, Fourth, Fifth, and Sixth Circuits have all explicitly rejected the minority’s possible impression standard akin to the standard for judge disqualification.¹²⁴

B. The Standard Articulated in Monster Energy

In 2006, City Beverages, doing business as Olympic Eagle Distributing, and Monster Energy signed a fixed-term contract giving Olympic exclusive distribution rights for Monster products within a specified territory.¹²⁵ In 2015, Olympic alleged that Monster committed breach of contract by terminating the distribution agreement without good cause when Monster exercised the contract’s clause permitting termination as long as it paid a severance fee of \$2.5 million.¹²⁶ Olympic rejected payment, citing a state law prohibiting termination of franchise contracts absent good cause.¹²⁷ Monster’s move was upheld in arbitration before JAMS,¹²⁸ the arbitration

120. See *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 177 (3d Cir. 2013) (“Statutory interpretation requires that we begin with a careful reading of the text.”).

121. See *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 253 (3d Cir. 2013) (noting that the statutory language indicates that evident partiality requires a stronger showing than the appearance standard—“namely, partiality that is evident”).

122. *Id.*

123. See *Cooper v. WestEnd Cap. Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016); *JCI Commc’ns, Inc. v. Int’l Brotherhood of Elec. Workers, Local 103*, 324 F.3d 42, 51 (1st Cir. 2003) (“[E]vident partiality means a situation in which ‘a reasonable person would have to conclude that an arbitrator was partial to one party to an arbitration.’” (quoting *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir. 2002))); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493, 500 (4th Cir. 1999); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998).

124. See *Freeman*, 709 F.3d at 251–53; *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285 (5th Cir. 2007) (en banc); *Andersons*, 166 F.3d at 325; *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993).

125. See *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1132–33 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

126. See *id.*

127. See *id.* at 1133.

128. JAMS, a private dispute resolution organization, was previously referred to as Judicial Arbitration and Mediation Services, Inc. Today, however, the organization only uses the acronym as its title. *The JAMS Name*, JAMS, <https://www.jamsadr.com/about-the-jams-name/> [<https://perma.cc/GM9V-TTQJ>] (last visited Mar. 16, 2021).

organization specified in the agreement,¹²⁹ and Monster was awarded \$3 million in attorneys' fees.¹³⁰

Overturning that award in October 2019, the Ninth Circuit agreed with Olympic's claim that the JAMS arbitrator—retired California state judge John W. Kennedy Jr.—had failed to adequately disclose his relationship to JAMS and his firm's relationship with Monster.¹³¹ The arbitrator provided the parties with a multipage disclosure statement containing a provision stating his general economic interest in the financial success of JAMS and warning the parties that they should assume one or more JAMS neutrals had, or would in the future, participate in another proceeding with one of the parties.¹³² Judge Kennedy further disclosed that he had personally presided over two previous arbitrations with Monster, one in which he ruled against the beverage company.¹³³

The Ninth Circuit's opinion found the arbitrator's disclosure inadequate because he failed to disclose that his "economic interest" in JAMS was, in fact, an ownership interest.¹³⁴ The court ruled that "arbitrators are required to disclose their ownership interests in the organizations they are affiliated with and the organizations' business dealings with the arbitration parties."¹³⁵ The opinion cited Justice White's concurrence from *Commonwealth Coatings*, emphasizing that when an arbitrator has a "substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed."¹³⁶ The court also noted that this formulation of the rule was previously adopted by the Ninth Circuit.¹³⁷ The opinion defined the Ninth

129. *Monster Energy*, 940 F.3d at 1132.

130. *See id.* at 1142 (Friedland, J., dissenting).

131. *See id.* at 1132 (majority opinion).

132. *See id.* at 1133. The text of the disclosure reads:

I practice in association with JAMS. Each JAMS neutral, including me, has an economic interest in the overall financial success of JAMS. In addition, because of the nature and size of JAMS, the parties should assume that one or more of the other neutrals who practice with JAMS has participated in an arbitration, mediation or other dispute resolution proceeding with the parties, counsel or insurers in this case and may do so in the future.

Id. A "neutral" is a "nonpartisan arbitrator typically selected by two other arbitrators—one of whom has been selected by each side in the dispute." *Neutral*, BLACK'S LAW DICTIONARY (11th ed. 2019).

133. *See Monster Energy*, 940 F.3d at 1139–40 (Friedland, J., dissenting) (pointing out that in addition to making the standard JAMS disclosure, Judge Kennedy also disclosed that he had arbitrated another dispute between Monster and a different distributor); *id.* at 1136 (majority opinion) (noting that Judge Kennedy's prior arbitration involving Monster resulted in an award of about \$400,000 against Monster); *see also* Petition for a Writ of Certiorari, *supra* note 13, at 10.

134. *See Monster Energy*, 940 F.3d at 1134.

135. Daniel Bornstein, *Ninth Circuit, Overturning an Award, Backs More Arbitrator Disclosure*, 37 ALTS. TO HIGH COST LITIG. 170, 170 (2019).

136. *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151–52 (1968) (White, J., concurring).

137. *See Monster Energy*, 940 F.3d at 1135 ("In a concurrence, Justice White noted that when an arbitrator has a 'substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed,'—a formulation of the rule that we have adopted." (quoting *Commonwealth Coatings*, 393 U.S. at 151–52 (White, J., concurring))).

Circuit's evident partiality rule as supporting vacatur of an arbitration award when (1) an arbitrator's undisclosed interest in an entity is substantial and (2) that entity's business dealings with one of the parties to the arbitration are nontrivial.¹³⁸

The court concluded that Judge Kennedy's ownership interest in JAMS as a co-owner was substantial because it afforded him a portion of profits from all of its arbitrations, not just those he personally conducted.¹³⁹ It further held that because JAMS had administered ninety-seven arbitrations for Monster over the past five years, their business dealings were more than trivial.¹⁴⁰

The court further cited state legislation and the Revised Uniform Arbitration Act (RUAA), adopted by several states within the circuit, which require extensive disclosure by neutral arbitrators.¹⁴¹ In California, arbitrators are required to disclose anything that might cause someone aware of the facts to reasonably entertain doubt as to the arbitrator's ability to be impartial, including anything that would constitute grounds, under the California Code of Civil Procedure, to disqualify a judge.¹⁴² The RUAA requires disclosure of all facts a reasonable person would consider likely to affect the arbitrator's impartiality.¹⁴³ It also establishes that there is a presumption of evident partiality when an arbitrator does not disclose a "known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party."¹⁴⁴ The Ninth Circuit vacated the arbitration award in favor of Monster, holding that the arbitrator's failure to disclose his ownership interest in JAMS created a "reasonable impression of bias."¹⁴⁵

Monster petitioned the Supreme Court to review the Ninth Circuit's decision, asking for clarification of the evident partiality standard and whether that standard mandates vacatur for an arbitrator's failure to disclose

138. *See id.* at 1135–36.

139. *See id.* at 1136. *But see* Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner at 11 n.6, *Monster Energy*, 940 F.3d 1130 (No. 19-1333) ("No owner-neutral has ever received more than *one-tenth of one percent* of JAMS's total revenue (\$100 for every \$100,000 of revenue) in a single year, and that small revenue share is untethered to the revenue from any specific party, lawyer, or law firm.").

140. *See Monster Energy*, 940 F.3d at 1136.

141. *See id.* at 1136–37.

142. *See id.* (citing CAL. CIV. PROC. CODE § 1281.9(a) (West 2021)). The court also cited a section of the Montana Annotated Code, which requires the same. *Id.* (citing MONT. CODE ANN. §§ 27-5-116(3)–(4) (2021)).

143. *See id.* (citing OR. REV. STAT. § 36.650(1)(1) (2020)).

144. *Id.* at 1137 (quoting ARIZ. REV. STAT. ANN. § 12-3012(E) (2021)).

145. *See id.* at 1138. The court also expressed concern over bias in favor of "repeat players" in arbitration, but because the "repeat player" phenomenon is an issue usually limited to employment and consumer arbitration cases, it is beyond the scope of this Note. *See id.* (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 209–17 (1997)); Cameron, *supra* note 12, at 131 (noting that concerns about bias in favor of "repeat players" usually arise in consumer and employment, as opposed to commercial, arbitrations).

a “de minimis ‘ownership interest’ in his arbitration firm . . . [which] has conducted a ‘nontrivial’ number of arbitrations with one of the parties.”¹⁴⁶

JAMS took an unprecedented step by filing an amicus brief in support of Monster’s rehearing petition.¹⁴⁷ It stressed that “[n]o owner-neutral has ever received more than *one-tenth of one percent* of JAMS’s total revenue . . . in a single year” and that the ninety-seven arbitrations it administered for Monster over the previous thirteen years constituted only a miniscule percentage of its entire business during that period.¹⁴⁸ Furthermore, during that same period, JAMS had also administered hundreds of arbitrations and mediations for Olympic.¹⁴⁹

JAMS elaborated on its measures to ensure its neutrals, whether they are owners or not, are insulated from factors that could compromise their impartiality¹⁵⁰ and noted that the Ninth Circuit’s decision constituted a departure from the existing rules and statutes regulating disclosures.¹⁵¹ No existing standard, JAMS argued, required arbitrators to report not only their own prior dealings with the parties in commercial arbitrations but all of the provider’s prior dealings with the parties as well.¹⁵²

The Court denied Monster’s petition,¹⁵³ leaving standing the Ninth Circuit’s ruling vacating the award.¹⁵⁴ Since then, several cases with similar facts have cited the Ninth Circuit’s decision and held the other way.¹⁵⁵ For example, the Eastern District of Pennsylvania, which sits in the Third Circuit,

146. Petition for a Writ of Certiorari, *supra* note 13, at i.

147. See Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner, *supra* note 139, at 2–3 (“JAMS has always refrained from supporting or opposing challenges made by parties to the arbitral process or to specific arbitration awards. . . . This case is the first time that JAMS has ever filed an amicus brief in its forty-plus year history.”).

148. *Id.* at 11 n.6 (“[T]he revenue attributable to any one party in a given time period, even a ‘repeat player,’ is a small fraction of the organization’s total revenues. For example, in the 13-year period in which JAMS administered 97 arbitrations involving Monster, it administered approximately 127,785 total cases.”). JAMS also emphasized that arbitrators receive no financial incentives to deliver particular outcomes, to create or retain relationships with customers, or for repeat business generated from clients they have administered arbitrations for in the past. *Id.* at 11–12. Arbitrators, like judges, also have legal immunity to protect them from possible reprisals from dissatisfied parties as a means of maintaining their neutrality. *Id.* at 12.

149. See Petition for a Writ of Certiorari, *supra* note 13, at 35 (“JAMS administered 93 arbitrations . . . and 429 mediations for one of Olympic’s law firms and 28 arbitrations . . . and 157 mediations for Olympic’s other law firm.”).

150. See Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner, *supra* note 139, at 11–12.

151. See *id.* at 6–7.

152. See *id.* at 7.

153. See *supra* note 12 and accompanying text.

154. See Heather Cameron, *Monster Energy and Evident Partiality*, CPR SPEAKS (June 29, 2020), <https://blog.cpradr.org/2020/06/29/monster-energy-and-evident-partiality/> [<https://perma.cc/RL2J-QUSB>].

155. See, e.g., *Levi Strauss & Co. v. Aqua Dynamics Sys., Inc.*, 473 F. Supp. 3d 1004, 1005 (N.D. Cal. 2020); *Martin v. NTT Data, Inc.*, No. 20-CV-0686, 2020 WL 3429423, at *9 (E.D. Pa. June 23, 2020); *Raley v. Daniel K. Hagood, P.C.*, No. 05-18-00914-CV, 2019 WL 5781916, at *3 n.3 (Tex. App. Nov. 6, 2019).

held in *Martin v. NTT Data, Inc.*¹⁵⁶ that though an arbitrator's failure or refusal to disclose an apparent interest or conflict might constitute compelling evidence of evident partiality, a party wishing to challenge an award on that basis must still produce "proof so powerfully suggestive of bias that a reasonable person would *have* to believe that [the arbitrator] was partial."¹⁵⁷ Although the court categorized the arbitrator's nondisclosure as "blatant and indefensible," it declined to vacate the award in question for evident partiality, in part, because it found the petitioner's failure to question the arbitrator's nondisclosures and potential bias until after the award was issued, suggestive of an attempt to "game the system" in the face of an unfavorable outcome.¹⁵⁸

The Supreme Court's decision not to grant certiorari in *Monster Energy* left the issue unsettled, meaning courts are likely to continue deciding evident partiality cases inconsistently between the circuits by applying different standards.¹⁵⁹

III. THE POSSIBLE IMPRESSION STANDARD EX ANTE, LIKELY ACTUAL BIAS EX POST

Rather than advocating wholesale for one standard or the other, this Note proposes a compromise, arguing for applying the likely actual bias standard ex post to evident partiality challenges and the possible impression standard ex ante to arbitrator disclosures.¹⁶⁰ This solution would ensure that awards

156. No. 20-CV-0686, 2020 WL 3429423 (E.D. Pa. June 23, 2020), *appeal dismissed*, No. 20-2717 (3d Cir. Jan. 14, 2021).

157. *Id.* at *8 (alteration in original) (quoting *Stone v. Bear, Stearns*, 872 F. Supp. 2d 435, 447 (E.D. Pa. 2012)). The court listed four factors, used in the Second and Fourth Circuits, to help determine whether the standard for evident partiality has been met. *Id.* These factors are "(1) The extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding." *Id.*

158. *See id.* at *9.

159. *Compare Biotronik, Inc. v. Fry*, No. 20-cv-00094, 2020 WL 5541074, at *3 (D. Or. Aug. 5, 2020) ("An arbitrator has a duty to investigate and disclose potential conflicts, and the 'failure to disclose to the parties any dealings that might create an impression of possible bias' is sufficient to support vacatur." (quoting *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007))), with *Martin*, 2020 WL 3429423, at *6 ("[T]here absolutely is a duty to disclose on the part of arbitrators and/or potential arbitrators, although 'failure to disclose, in and of itself, is *not* a basis for vacating an arbitration award.' Instead, non-disclosure 'has relevance in the vacatur context only to the extent that the non-disclosure reveals evident partiality.'" (quoting *Stone v. Bear, Stearns*, 872 F. Supp. 2d 435, 447 (E.D. Pa. 2012))).

160. Clarification on the standard for disclosures is necessary because although providers' guidelines for arbitrators encourage them to err on the side of more disclosure when there might be a conflict, the rules do not explicitly state an applicable standard for evaluating whether such disclosures are required or if failure to disclose a particular fact merits disqualification or recusal. For example, the AAA advises arbitrators not to judge the significance of potential conflicts for themselves but rather to disclose any and all possible conflicts and contacts to the parties and allow them to decide the significance for themselves. *See A. Kelly Turner, The What, Why, and How of Arbitrator Disclosures*, AM. ARB. ASS'N (Dec. 16, 2019), <https://www.adr.org/blog/the-what-why-and-how-of-arbitrator-disclosures>

meant to be final and binding cannot be easily overturned for evident partiality without showing, to a high degree of likelihood, that the arbitrator was indeed biased in favor of one of the parties, while simultaneously promoting educated decision-making by the parties and a high degree of transparency in the proceedings.

This approach is also appealing from an international perspective. Adopting the likely actual bias standard for vacatur would be in better keeping with the global trend for judicial review.¹⁶¹ In light of commercial arbitration's international nature, it is somewhat impractical to hold arbitrators to judicial standards that are conceived of in specific domestic contexts and are, therefore, necessarily culturally specific.¹⁶² Maintaining a high bar for vacatur while adopting stricter disclosure standards aligns with international parties' expectations that they will be able to define and control

[<https://perma.cc/B4Z7-4FP7>]. However, the language actually used in the rules suggests a standard more akin to likely actual bias than possible impression. Both the AAA's and JAMS's commercial arbitration rules direct arbitrators to disclose circumstances "likely to give rise to justifiable doubt as to the [a]rbitrator's impartiality or independence." COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES r. 17(a) (AM. ARB. ASS'N 2013); see JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES r. 15(h) (JAMS 2014).

161. See BORN, *supra* note 16, at 1787 ("[T]he trend in recent years has . . . been away from equating or linking standards of impartiality of international arbitrators to those of national court judges."). For example, the standard in England, which serves as a model for the common-law approach and has influenced African and Asian countries' arbitration practices, considers "whether a 'fair-minded and informed observer' would conclude that there was a 'real possibility' that the arbitral tribunal was not impartial." Feehily, *supra* note 26, at 100; see also Pedro Sousa Uva, *A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*, 20 AM. REV. INT'L ARB. 479, 481 (2009). A successful challenge under that system requires demonstrating circumstances that give rise to "justifiable doubts as to [the arbitrator's] impartiality." See *id.* at 486 (quoting Arbitration Act 1996, c. 23, § 24(1)(a) (UK)); see also *Halliburton Co. v. Chubb Berm. Ins. Ltd.* [2020] UKSC 48 (appeal taken from Eng.) (confirming that English law applies an objective test to determine whether there are justifiable doubts as to the arbitrator's impartiality by asking whether a fair-minded and informed observer would conclude there is a real possibility of bias). "English law establishes a high threshold, making it difficult to uphold a request for annulment of an award rendered by an allegedly biased arbitrator." Uva, *supra*, at 487. In France—which has influenced legislation in Middle Eastern and some African countries—courts only interfere under extreme circumstances, declining to set aside awards for impartiality unless the arbitrator failed to comply with due process. See *id.* at 481, 499; see also Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews*, 9 Y.B. ON ARB. & MEDIATION 159, 169–70 (2017). The French approach balances this practice by applying strict standards on the duty to disclose. See Lee, *supra*, at 170. Similarly, Germany, which follows the United Nations Commission on International Trade Law (UNCITRAL) model law approach and has an impact on Japanese and Chinese legislation, only allows courts to set aside awards for an arbitrator's lack of impartiality or independence under circumstances "that would lead an objective third party to consider that an arbitrator was acting in the interest of one party." See Uva, *supra*, at 481, 495. On the other hand, Australia and South Africa, though common-law jurisdictions like England, have adopted somewhat less demanding standards, allowing vacatur for a "reasonable suspicion" or "apprehension" of bias. See Feehily, *supra* note 26, at 100–01.

162. See Feehily, *supra* note 26, at 109–10 ("The fragmented framework of international arbitration depends on more fluid processes for the selection of decision makers and for vetting their integrity.").

their arbitrations, encourages the parties' full and informed consent during the selection process, and protects their interest in final and binding awards.

Part III.A critically evaluates the standards for vacatur used by the majority and minority circuits, arguing for the likely actual bias standard for evaluating vacatur under § 10(a)(2) of the FAA. Part III.B calls on the Supreme Court to grant certiorari on the issue to clarify that likely actual bias is the correct standard *ex post*. Part III.C argues for applying the possible impression standard to the determination of which disclosures arbitrators are required to make and proposes a private law solution, including a system that shifts the burden to investigate an arbitrator's disclosures onto the parties *ex ante*.

A. A Case for the Likely Actual Bias Standard to Vacate for Evident Partiality

Both the possible impression and the likely actual bias standard offer valuable protection for key features of arbitration. Possible impression focuses on maintaining a high standard of neutrality and fairness in the process, while the likely actual bias standard tempers that concern with the countervailing interests of independence from courts and the finality of awards.

What courts applying either standard fail to do is distinguish between two distinct, yet overlapping concerns. Courts adopting the possible impression standard are primarily concerned with disclosures arbitrators must make before arbitration, while courts adopting the likely actual bias standard focus more heavily on the bar for vacatur of an award after the arbitration is complete.

Adopting a higher bar for parties moving to have an award vacated for evident partiality runs the risk of making justice more difficult for a party that truly was placed, without prior knowledge, at an unfair disadvantage due to an arbitrator's bias. A lower bar, on the other hand, runs the not-at-all-speculative risk¹⁶³ of opening a window for parties—like the bank in this Note's introductory hypothetical¹⁶⁴—to succeed on bad faith attempts to overturn awards, not because they really believe the arbitrator was biased in favor of the other party but because they hope to get “a second bite at the apple.”¹⁶⁵

As noted by the Third Circuit, a plain reading of § 10's text seems to suggest something more than the mere possibility of partiality is required to vacate an award.¹⁶⁶ “Evident,” after all, means “clear to the vision or understanding” with synonyms like “manifest,” “obvious,” “apparent,” and

163. See Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner, *supra* note 139, at 8.

164. See Korland, *supra* note 1; *supra* note 1 and accompanying text.

165. Martin v. NTT Data, Inc., No. 20-CV-0686, 2020 WL 3429423, at *9 (E.D. Pa. June 23, 2020) (quoting Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 250 (3d Cir. 2013)).

166. See Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 253 (3d Cir. 2013).

“plain.”¹⁶⁷ “Evident implies presence of visible signs that lead one to a definite conclusion.”¹⁶⁸ Saying “the child spoke with evident anguish about losing her doll” does not mean the same thing as “she spoke with possible anguish about losing her doll.” “Evident anguish” is clear, obvious, and apparent. Though somewhat clumsy sounding, a more accurate restatement of the first sentence would be “the child spoke with likely actual anguish about losing her doll.”

The *noscitur a sociis* canon of statutory interpretation¹⁶⁹ also weighs in favor of interpreting evident partiality as requiring a showing of likely actual bias.¹⁷⁰ The other grounds for vacatur under § 10 of the FAA are corruption, fraud, undue means, misconduct or misbehavior that prejudiced the rights of one of the parties, and an arbitrator exceeding one’s powers.¹⁷¹ Courts apply high standards of proof to petitioners seeking vacatur of an arbitral award under all of § 10’s other grounds.¹⁷²

For vacatur to be appropriate under § 10(a)(1), a petitioner must show that it is “abundantly clear”¹⁷³ that the arbitration award was procured by corruption, fraud, or undue means.¹⁷⁴ Under § 10(a)(3), an award can only be set aside for an arbitrator’s procedural misconduct if it is “in bad faith or so gross as to amount to affirmative misconduct.”¹⁷⁵ To show that an award must be overturned, a party seeking vacatur under § 10(a)(4) “bears a heavy burden.”¹⁷⁶ Such a party is required to do more than show that the arbitrator “committed an error—or even a serious error.”¹⁷⁷

167. See *Evident*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/evident> [https://perma.cc/H9F9-HCHS] (last visited Mar. 16, 2021).

168. *Id.*

169. *Noscitur a sociis* is Latin for “it is known by its associates.” *Noscitur a sociis*, BLACK’S LAW DICTIONARY (11th ed. 2019). It is a “canon of construction holding that the meaning of an unclear word or phrase, esp. one in a list, should be determined by the words immediately surrounding it.” *Id.*

170. See *Petition for a Writ of Certiorari*, *supra* note 13, at 27 (citing *United States v. Williams*, 553 U.S. 285, 294 (2008)).

171. 9 U.S.C. § 10(a)(1)–(4).

172. See *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (“Sections 10 and 11 [of the FAA] . . . address egregious departures from the parties’ agreed-upon arbitration.”); *Simons v. Brown*, 444 F. Supp. 3d 642, 650–51 (E.D. Pa. 2020) (“Each of the [§ 10(a)(3) and 10(a)(4)] grounds upon which [the petitioner] asks me to vacate the award requires a steep climb over difficult terrain.”); see also Brian T. Burns, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813, 1845 (2010) (“Section 10’s grounds for vacatur—‘corruption,’ ‘fraud,’ ‘evident partiality,’ and the like—deal with ‘egregious’ and ‘outrageous conduct.’” (quoting *Hall St. Assocs.*, 552 U.S. at 586)).

173. *EB Safe, LLC v. Hurley*, 832 F. App’x 705, 708 (2d. Cir. 2020) (quoting *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 34 (2d Cir. 1951)).

174. *Id.* (“To warrant vacatur . . . the petitioner must establish that: ‘(1) respondent engaged in fraudulent activity; (2) even with the exercise of due diligence, petitioner could not have discovered the fraud prior to the award issuing; and (3) the fraud materially related to an issue in the arbitration.’” (quoting *Odeon Cap. Grp. LLC v. Ackerman*, 864 F.3d 191, 196 (2d Cir. 2017))).

175. *Simons*, 444 F. Supp. 3d at 651 (quoting *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987)).

176. See *id.* at 654 (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013)).

177. *Id.*

All of the § 10 grounds for vacatur, including evident partiality, are aimed at protecting parties from unfairly obtained awards.¹⁷⁸ In light of the heavy burden on petitioners seeking vacatur under any other provision in § 10, allowing an award to be overturned for the mere possibility of an arbitrator's bias seems like a policy choice rather than a faithful reading of the text of the statute. The majority rule then, likely actual bias, seems to more accurately capture the intent of § 10(a)(2).

There is also a straightforward policy argument to be made for maintaining a high standard for finding evident partiality. Allowing courts to vacate arbitral awards for evident partiality under limited circumstances serves the dual purpose of (1) promoting justice by allowing courts to overturn awards made by arbitrators who are actually biased and (2) preserving popular confidence in commercial arbitration as a fair and equitable institution by maintaining the appearance of impartiality. Between those two goals, however, the more salient concern is ensuring that parties are not forced to abide by arbitral awards decided by adjudicators who are actually biased in favor of the other party. Since the likely actual bias standard is geared toward addressing those situations, while continuing to promote finality, it constitutes the better compromise.

B. Clarification from the Supreme Court Is Needed

The Supreme Court should grant certiorari to confirm that likely actual bias is the correct standard for determining when an arbitral award may be vacated for evident partiality.¹⁷⁹ Determining who is right about which Justice penned the controlling opinion in *Commonwealth Coatings* is a complicated area of the law and worth examining but beyond the scope of this Note.¹⁸⁰ It is also, ultimately, less important than the relevant substantive question—which standard constitutes the more faithful reading of § 10(a)(2) and the wiser policy choice in light of today's commercial arbitration landscape?¹⁸¹

As discussed above in Part III.A, a plain reading of § 10(a)'s text weighs heavily in favor of the likely actual bias interpretation of the evident partiality

178. See 9 U.S.C. § 10(a)(1)–(4).

179. While a congressional amendment to the FAA might also be an effective means of clarifying the evident partiality standard, finding that such an amendment is less likely, this Note focuses instead on resolution in the Supreme Court. A proposed amendment to § 10(a) was introduced in the Senate on February 28, 2019. See S. 635, 116th Cong. § 4 (2019). The proposed amendment had failed to pass in Congress as of December 31, 2020. *US S635*, BILLTRACK50, <https://www.billtrack50.com/billdetail/1091878> [https://perma.cc/4VTR-4595] (last visited Mar. 16, 2021). Considering that a plain reading of § 10's text supports the likely actual bias standard, an amendment is not necessary to correct its wording. See *supra* Part III.A. All that is needed is clarification of the proper interpretation, and interpretation of the law is one of the Court's core functions. See 16A AM. JUR. 2D *Constitutional Law* § 257 (2020). Furthermore, in light of the Supreme Court's pro-arbitration stance, the Court seems likely to favor a policy that would minimize the need for and the courts' ability to administer judicial review of arbitral awards. See Cameron, *supra* note 12, at 132.

180. See *supra* note 48.

181. See *supra* note 48.

standard, and the Supreme Court favors textualist interpretations.¹⁸² Furthermore, should the Court find that Justice Black's lower possible impression standard is, in fact, the binding law to come out of *Commonwealth Coatings*, it is the only court with the authority to overrule that precedent.¹⁸³

Commonwealth Coatings was decided in 1968 and commercial arbitration has changed significantly since then.¹⁸⁴ Many of the world's largest and busiest arbitral institutions were not established until just before or well after *Commonwealth Coatings* was decided.¹⁸⁵ Today's Court would be able to consider standardized contract clauses providing for arbitration administered by a particular provider and the subsequent questions about the repeat business to which it gives rise. *Monster Energy* involved repeat business connections between an arbitral provider and a large corporation that was one of the parties to arbitration.¹⁸⁶ The court found evident partiality on the grounds of the arbitrator's failure to disclose his interest in the provider that had connections with a party, not on the basis of a failure to disclose his own direct connections or business relationships with that party.¹⁸⁷ That sort of indirect connection was not a factor in *Commonwealth Coatings*.¹⁸⁸

As a policy matter, the Court could also consider private law solutions, such as the one proposed in Part III.C below. Because there are other viable means of protecting parties from decisions made by possibly biased

182. See Joseph S. Diedrich, *A Jurist's Language of Interpretation*, WIS. LAW., July/Aug. 2020, at 36, 37.

183. See Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 FORDHAM L. REV. 53, 53–54 (1982); *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019); see, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

184. See Cameron, *supra* note 12, at 131 (discussing the rise in prevalence of contracts calling for arbitration administered by particular arbitral providers, increasing the likelihood that large companies will participate in a great number of arbitrations with the same provider, and noting that this has significantly complicated the judiciary's ability to determine what constitutes a "nontrivial" versus a "trivial" number of arbitrations); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 67–70 (2015).

185. See, e.g., *About HKIAC*, H.K. INT'L ARB. CTR., <https://www.hkiac.org/about-us> [<https://perma.cc/95L6-X3LK>] (last visited Mar. 16, 2021) (noting its founding in 1985); *About ICSID*, INT'L CTR. FOR SETTLEMENT INV. DISPS., <https://icsid.worldbank.org/About/ICSID> [<https://perma.cc/W6K3-W9P9>] (last visited Mar. 16, 2021) (noting its founding in 1966); *About Us*, JAMS, <https://www.jamsadr.com/about/> [<https://perma.cc/C3R2-C35W>] (last visited Mar. 16, 2021) (noting its founding in 1979); *Highlights*, SING. INT'L ARB. CTR., <https://www.siac.org.sg/64-why-siac> [<https://perma.cc/TTQ5-UNJ7>] (last visited Mar. 16, 2021) (noting its founding in 1991); *History*, INT'L INST. FOR CONFLICT PREVENTION & RESOL., <https://www.cpradr.org/about/history> [<https://perma.cc/6T2N-7QQG>] (last visited Mar. 16, 2021) (noting its founding in 1977).

186. See *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1136 (9th Cir. 2019), cert. denied, 141 S. Ct. 164 (2020) (mem.).

187. See *id.*

188. See *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 146 (1968).

arbitrations, the Court would likely find no compelling reason to depart from § 10(a)(2)'s plain meaning.¹⁸⁹

C. A Place for the Possible Impression Standard in Disclosure Guidelines

It is wholly consistent to apply different partiality standards *ex ante* and *ex post*. Applying the possible impression standard before arbitration would require that arbitrators disclose everything they subjectively know would meet the very strict judicial standard for impartiality. Applying the likely actual bias standard after arbitration would mean declining to automatically vacate an award because one of the parties uncovers something *ex post* that the arbitrator was not aware of but that would conceivably have met that strict judicial standard for disclosure.

To adequately address concerns about fairness to the parties, particularly in light of a standard that imposes a higher bar for establishing evident partiality after an award has been made, more clarity is needed regarding arbitrator disclosures.¹⁹⁰ A clear and uniform list of required disclosures would ensure that parties are able to make fully informed decisions before settling on an adjudicator. It would help arbitrators confidently make disclosures without fear that their integrity will be called into question down the line or that their awards will be thrown out. It would also narrow the number of situations where a court would be required to make a judgment call on whether certain additional undisclosed information constitutes sufficient evidence of evident partiality.¹⁹¹

Arbitral providers could organize committees comprised of practitioners, experts, and interested industry members to compile such a disclosure list. In addition to a list of universal disclosure requirements built by referencing current standards and relevant court decisions,¹⁹² committees could build

189. Outside the United States, various jurisdictions have balanced an approach that sets a higher bar for vacating an award based on an arbitrator's bias with strict disclosure obligations. *See* Feehily, *supra* note 26, at 102–03.

190. “[A]rbitrators have only the phrase ‘impression of possible bias’ as a guide to disclosure. The phrase itself offers little practical assistance; it is an amorphous guide whose contours are developed by judges in a *post hoc* determination of what an arbitrator *should* have disclosed.” Matthew David Disco, Note, *The Impression of Possible Bias: What A Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 116 (1993).

191. Considering that clear disclosure requirements would help protect the legitimacy of arbitration, this endeavor also aligns with the Court's pro-arbitration stance and would help further justify the Court in adopting a more difficult-to-meet standard for evident partiality. *See* Cameron, *supra* note 12, at 132; *supra* Parts III.A–B.

192. As a starting point, committees may consult the International Bar Association's (IBA) Guidelines on Conflicts of Interest in International Commercial Arbitration. *See* Feehily, *supra* note 26, at 111. In addition to general standards, the IBA guidelines include a nonexhaustive list of circumstances that might require disclosure, categorizing them according to the colors on a traffic light to indicate the likelihood that they would give rise to doubts about partiality. *Id.* The red list includes circumstances that present serious conflicts of interest and is divided between those that are waivable by the parties and those that are nonwaivable. *Id.* at 112. Circumstances on the orange list are ones that arbitrators are required to disclose, and the green list includes circumstances unlikely to raise questions of impartiality and independence that, therefore, do not require disclosure. *Id.*

industry-specific lists by consulting individuals within those fields to find out what kind of relationships might make them question an arbitrator's impartiality. Direct pecuniary interest in the outcome should certainly qualify as a universally required disclosure,¹⁹³ but it is possible that, depending on a particular industry's size and practices, the degree of connection or number of prior business relationships industry members find acceptable may vary.¹⁹⁴

Using such a disclosure list as a guide, arbitrators should then be required to disclose any and all sources of potential bias of which they are subjectively aware. Arbitrators should be instructed to err on the side of disclosure if they are unsure whether a particular relationship or fact might warrant inclusion.

This Note's proposal differs from existing scholarship in that, rather than imposing an affirmative obligation on arbitrators to investigate their own potential sources of bias or neglecting to address the problem posed by possible biases arbitrators do not actually know about, it recommends that parties should be required to investigate such possible biases to their own satisfaction.¹⁹⁵ It is inefficient and somewhat counterintuitive to ask arbitrators to investigate their own potential bias. Arbitrators, like everyone else, are likely to overestimate their own ability to be impartial.¹⁹⁶ They can disclose what they subjectively know or believe might compromise their impartiality, but the parties' judgments about an arbitrator's impartiality are what ultimately matter because they have the power to object to an

193. See *Commonwealth Coatings*, 393 U.S. at 151 (White, J., concurring); see also Korland, *supra* note 1, at 816 ("Examples of such conflicts are numerous and can include situations where an arbitrator has prior or current financial dealings with a party to the arbitration, an employee of a party to the arbitration, counsel for a party to the arbitration, or a witness who appears during the course of the arbitration. Additionally, an arbitrator can have potential conflicts that stem from family relationships or social contacts with the disputants. Attorneys or businesspeople may also face conflicts based on current or past professional associates having dealings with the parties to the arbitration.").

194. See BORN, *supra* note 16, at 1779 ("[T]he acceptable degree of risk of partiality should vary depending on the circumstances of particular cases."); Feehily, *supra* note 26, at 110.

195. See Korland, *supra* note 1, at 832–35 (proposing a system where arbitrators are encouraged to investigate their own potential sources of bias, and a party wishing to maintain an arbitration award that has been challenged for evident partiality can make an affirmative defense by showing that the arbitrator made a reasonable attempt to investigate and did not have knowledge of the conflict); Lee, *supra* note 161, at 176 (proposing that parties incorporate the IBA guidelines into their agreements and courts use its color-coded system to determine whether particular failures to disclose constitute impartiality but failing to address how the IBA guidelines would help courts address sources of bias that the arbitrator did not disclose due to lack of actual knowledge); Windsor, *supra* note 30, at 213–14 (proposing an affirmative legal duty on arbitrators to investigate their own potential conflicts before arbitration).

196. See Adam Alter, *The Persistent Illusion of Impartiality*, PSYCH. TODAY (June 2, 2010), <https://www.psychologytoday.com/us/blog/alternative-truths/201006/the-persistent-illusion-impartiality> [<https://perma.cc/RHQ2-3G8X>]; Joan Stearns Johnsen, *Why Your Arbitrator Is Biased*, AM. BAR ASS'N (Mar. 18, 2015), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2015/why-your-arbitrator-is-biased/> [<https://perma.cc/Z33W-A47E>].

arbitrator's appointment¹⁹⁷ and would ultimately be the ones to move for vacatur after an award has been issued.

Considering an arbitrator's livelihood as such depends on their reputation for impartiality, a system where parties are charged with investigating the arbitrator's disclosures would provide an effective pre-arbitration check on the adequacy of the arbitrator's disclosures and give parties a chance to make informed and explicit decisions about any facts that might compromise the arbitrator's judgment. If, during the course of its investigation, a party discovers a potential source of conflict that the arbitrator was apparently unaware of, and therefore did not disclose, the party may then decide whether it is significant enough to warrant objecting to the arbitrator's appointment. If a party discovers something it does not reasonably believe the arbitrator could have been unaware of but which the arbitrator did not disclose, the party would be free to object to the arbitrator before the arbitration begins.¹⁹⁸

In the case of an honest mistake or misunderstanding, the arbitrator may be able to provide further context or explanation to assuage the party's concerns. In cases where an arbitrator truly was trying to conceal something, being caught would likely be sufficiently embarrassing and professionally awkward to encourage the arbitrator to make adequate disclosures in the future.¹⁹⁹ As an additional measure, arbitral providers could keep their own records of such undisclosed information discovered by parties and require arbitrators to make such disclosures in the future or, if they believe a genuine ethical concern has been raised, reconsider the arbitrator's place on their roster.

With this pre-arbitration system in place, after an award has been made, it should be vacated only if a reasonable person would conclude, to a high degree of certainty, that the arbitrator was in fact biased. The high bar for vacatur under § 10(a)(2) would no longer pose the same risk of subjecting parties to unfair awards simply because they cannot prove likely actual, as opposed to merely possible, bias. The affirmative duty to investigate would reveal easily discoverable possible bias ahead of time and allow parties to object.

In case of relationships or connections that are likely to bias an arbitrator but were not disclosed or easily discoverable by the parties during the course

197. Arbitral providers, like the AAA, may also determine on their own initiative that an arbitrator should be disqualified. See *Review Standards*, AM. ARB. ASS'N, https://www.adr.org/sites/default/files/document_repository/AAA_AdminReviewCounsel_Standards.pdf [<https://perma.cc/67ME-ZRRC>] (last visited Mar. 16, 2021).

198. An arbitrator's duty to disclose potential sources of bias continues throughout the duration of arbitration. See Feehily, *supra* note 26, at 100. This means that if a new source of bias arises out of a new or existing connection or relationship, or the arbitrator becomes aware of a possible conflict they did not recognize as such when making initial disclosures, they are required to disclose that fact to the parties. "Any party can make an objection to an arbitrator at any time in the arbitration, up to the issuance of the Award or other terminating order." *Review Standards*, *supra* note 197.

199. See Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner, *supra* note 139, at 12 (noting that every neutral has an interest in providing high quality service to the parties so that even the losing party and their counsel will consider appointing them in future matters).

of investigation, parties would still be able to move for vacatur for evident partiality. However, knowing that the mere possible impression of bias is insufficient, the standard's higher bar would mean parties would be less likely to go on fishing expeditions in the wake of unfavorable awards, looking for anything that could be used as grounds for vacatur.²⁰⁰

This proposed solution would have yielded a better outcome in *Monster Energy*. A prescribed list of mandatory disclosures could have included ownership interest in one's firm, however small, meaning that Judge Kennedy would have known he was required to disclose that fact in addition to the standard disclosures he did make.²⁰¹ As it stood, no existing rules, standards, or statute required disclosure of the arbitrator's small ownership interest in the arbitration provider.²⁰²

Judge Kennedy likely did not disclose his ownership interest because he did not subjectively believe there was any reason his owner status would in any way bias him in favor of either party.²⁰³ Inferring that an arbitrator would be biased in favor of one of the parties because he had a small, general ownership interest in the provider administering the arbitration is, at most, a possible source of bias but not a highly likely one. Had Olympic had an affirmative duty to investigate the arbitrator's potential bias, their investigation would likely have revealed that Judge Kennedy, like many other JAMS arbitrators, was an owner and that JAMS had administered several arbitrations for Monster in the recent past.²⁰⁴ If, upon such discovery, Olympic had doubted Judge Kennedy's explanation for failing to include that information in his disclosures, Olympic would have been free to object to his appointment.

This proposal could be implemented on a national level by amending the FAA to include the possible impression standard for disclosures, but considering that the amendment process is slow and difficult, this Note does not focus on it.²⁰⁵ A state law solution might also be an effective means of implementing this Note's proposal insofar as those state laws do not conflict with a reading of the FAA that requires likely actual bias to find evident partiality.²⁰⁶ In *Monster Energy*, the Ninth Circuit noted that several states in the circuit had adopted the RUAA, which specifically addresses requirements for arbitrator disclosures and evident partiality.²⁰⁷ However,

200. *Id.* at 8.

201. *See supra* Part III.B.

202. *See* Brief of JAMS, Inc. as Amicus Curiae in Support of Petitioner, *supra* note 139, at 3.

203. *See* Petition for a Writ of Certiorari, *supra* note 13, at 35 (noting that the fact JAMS is owned by some of its neutrals is publicly available on the JAMS website); *see also supra* note 199.

204. *See* Petition for a Writ of Certiorari, *supra* note 13, at 10–11.

205. *See supra* note 179.

206. A state law attempting to impose a different evident partiality standard would be preempted by the FAA and, therefore, invalid. REVISED UNIF. ARB. ACT para. 3 (UNIF. L. COMM'N 2000).

207. *See* *Monster Energy Co. v. City Beverages, LLC*, 940 F.3d 1130, 1136–37 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 164 (2020) (mem.).

existing model laws do not impose the possible impression standard on disclosures or an affirmative duty on the parties to investigate.²⁰⁸

Private adoption by arbitral providers would likely be effective and much faster. Most providers already impose extensive disclosure requirements on arbitrators²⁰⁹ and they can—and do—update their rules and guidelines as needed.²¹⁰ Private arbitral entities are likely to willingly adopt the possible impression standard for disclosures without requiring regulation because it would not be a great departure from their current practices and would increase parties' faith in the institution's neutrality. Implementing this proposal would simply require adding language to provider rules informing parties and arbitrators of the standard and of the parties' affirmative duty to investigate, including the rights and responsibilities that duty entails.

CONCLUSION

The Supreme Court's decision about the FAA's evident partiality standard in *Commonwealth Coatings* left courts with little guidance, leading to a circuit split and a robust debate. Between the two commonly used standards for determining when vacatur is appropriate under § 10(a)(2) of the FAA, the likely actual bias standard is a more accurate reading of the law. It is also a better policy choice, considering arbitration's competing interests of fairness and finality. The Supreme Court should grant certiorari to clarify the high bar evident partiality sets for overturning arbitral awards.

To protect parties from the harm of awards made by potentially biased arbitrators, providers should implement a private law solution that explicitly invokes the possible impression standard in their disclosure guidelines.

208. The RUAA imposes the likely actual bias standard on disclosures and an affirmative duty to investigate on the arbitrator. UNIF. ARB. ACT § 12(a) (UNIF. L. COMM'N 2000) ("Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in that arbitration proceeding."). States could also adopt the UNCITRAL Arbitration Rules, but they also only require disclosure of "circumstances likely to give rise to justifiable doubts," which is not as broad a requirement as the possible impression standard. See G.A. Res. 65/22, art. 11 (Dec. 6, 2010).

209. See Cameron, *supra* note 12, at 132 (discussing what has been referred to as JAMS's "platinum" disclosure standards); see, e.g., ARBITRATION RULES art. 11.2 (INT'L CHAMBER COM. 2021) ("The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality."); INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 13 (INT'L CTR. DISP. RESOL. 2014); JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES r. 15(h) (JAMS 2014) ("The Parties and their representatives shall disclose to JAMS any circumstance likely to give rise to justifiable doubt as to the Arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the Arbitration or any past or present relationship with the Parties or their representatives. The obligation of the Arbitrator, the Parties and their representatives to make all required disclosures continues throughout the Arbitration process.").

210. Cameron, *supra* note 12, at 132 (noting that JAMS, the International Institute for Conflict Prevention and Resolution, and the AAA were all reevaluating their disclosure requirements following the Ninth Circuit's decision in *Monster Energy*).

Providers should also adopt an explicit, industry-sensitive set of disclosure requirements for arbitrators and impose an affirmative duty on parties to investigate—to their own satisfaction—the sufficiency of arbitrators' disclosures.

Under this system, the arbitrator overseeing the bank's arbitration in this Note's introduction would have known whether she was required to disclose that she had once held an account with them, however long ago. The bank would have known what guidelines the arbitrator was using and that if it thought the required disclosures were incomplete or if it were in any way dissatisfied with her disclosures, it was the bank's responsibility to investigate further before an award was made. If the bank failed to make a timely objection to the arbitrator, any resulting decision or award would be protected—as intended by the FAA—from the bank's bad faith attempt to vacate for evident partiality.